U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 28Sep2001

DATE:
CASE NO. 2001-INA-96

In the Matter of:

RICARDO SANCHEZ
Employer

On Behalf of:

ADRIANA COROMOTO CONTRERAS
Alien

Appearance: Martha E. Garza, Esquire
For the Employer

Certifying Officer: Floyd Goodman
Atlanta, GA

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely

affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On October 9, 1997, the Employer, Ricardo Sanchez, filed an application for labor certification to enable the Alien, Adriana Coromoto Conteras, to fill the position of Domestic Cook (AF 62-65). The job duties for the position, as stated on the application, are as follows:

> Plans menus; cooks meats, vegetables, assorted dishes, and desserts according to taste of employer; cleans kitchen, cooking appliances/utensils.

(AF 64). The only stated job requirement for the position is: 2 years of experience in the job offered (AF 64).

The CO issued a Notice of Findings ("NOF") on July 24, 2000, in which he proposed to deny certification on the grounds that the job opportunity did not appear to be a bona fide one which is open to U.S. workers, in violation of §656.20(c)(8). (AF 35-37). The Employer submitted his rebuttal on or about August 23, 2000 (AF 25-34). However, the CO found the rebuttal unpersuasive, and issued a Final Determination, dated November 9, 2000, denying certification (AF 23-24). Subsequently, the Employer appealed the Final Determination (AF 1-22), and the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

Discussion

In the NOF, the CO questioned whether there is a bona fide job opening for qualified U.S. workers. The CO insinuated that the Employer was creating a position and attempting to classify it as a Domestic Cook, rather than a General Houseworker or Child Monitor, so that the Alien would be categorized as a "skilled worker," in order to improve her immigration status (AF 35-37). Accordingly, the CO set forth a series of questions, and requested that the Employer respond thereto and provide appropriate supporting documentation. Among the questions posed and the documentation requested were the following:

> What percentage of the employer's disposable income will be devoted to paying the alien's salary? Your answer must be supported by providing a copy of your Federal Income Tax Return for the immediately preceding calendar year.

(AF 37).

In his rebuttal, the Employer stated, in pertinent part:

> *The Cook is paid the prevailing wage as determined by the Florida Department of Labor and Employment Security at $5.61 per hour.* ***Our income last year was over $100,000. At this time, however, I am not able or willing to provide a copy of our Income Tax Return but I will provide the documentation at such time as it is required by statute or regulations. I do affirm that I am able and willing to pay the wages offered.***

(AF 32)(emphasis in original).

In the Final Determination (AF 23-24), the CO reiterated that, in the NOF, he had questioned whether there was a bona fide job opportunity available, and he had directed the Employer to provide responses to various questions, as well as documentation. Moreover, in the NOF, the CO had specifically stated:

> *Your responses, documentary evidence, and all other relevant factors, will be evaluated to determine whether the position of Domestic Cook actually exists in your household. The adequacy of the documentation will be key to the evaluation of your application because little weight will be accorded to statements that are not supported by docuementary (sic) evidence. Merely answering all the questions does not insure approval of the application.*

(AF 36; see also AF 24).

Notwithstanding the foregoing statement, and the CO's clear instructions directing the Employer to provide a copy of his Federal Income Tax Return for the immediately preceding calendar year, the Employer failed to do so, in its rebuttal. Accordingly, in the Final Determination, the CO stated, in pertinent part:

> The employer's failure to provide the Federal Income Tax Return as requested is a failure to address a deficiency noted in the NOF and as such supports a denial of labor certification. Therefore labor certification is denied.

(AF 24).

On appeal, the Employer argues that the Application for Alien Employment Certification form contains a certification, that he has enough funds available to pay the wages or salary offered the alien. Furthermore, the Employer signed the "Declarations" section under "penalty of perjury." The Employer further contends that "the specific requirement for evidence of the employer's ability to pay the wage offered comes into play when the Petition for Alien Worker (Form I-140) is filed with the Immigration and Naturalization Service under 8 C.F.R. Section 204.5(g)(2)." Thus, the Employer states that "it is unfair and unduly burdensome to require of the employer to submit evidence which is actually and clearly required in the next step of the employment-based immigration procedure, in the immigrant visa petition process." (AF 2-3; *see also,* AF 65, Sections 23, 24).

Upon review, we find little merit to the Employer's argument. It is well established that a CO may make reasonable requests for documentation showing an employer has the ability to pay the wage offered as required by §656.20(c)(1). Thus, the CO's request of the Employer to provide a copy of his Federal Income Tax Returns is deemed reasonable, *not* unduly burdensome. Accordingly, the Employer's failure to comply with the CO's reasonable request constitutes a ground for denial of certification. *See, e.g., The Whislers*, 1990-INA-569 (Jan. 31, 1992); *JC2N, Inc.*, 1993-INA-195 (June 9, 1994); *Kayveekay Gems*, 1994-INA-174 (Dec. 23, 1994).[1] Therefore, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

A
JOHN C. HOLMES
Administrative Law Judge

[1]Employer belatedly sought to submit a copy of an unsigned, undated, 1999 Federal Income Tax Return on appeal (AF 8-22). However, this new evidence, which was first submitted with the request for review, will not be considered by the Board. *See, e.g., Capriccio's Restaurant*,1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.